SUPREME COURT, U. S.
DEC 29 19
MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

No. 73-1020

JOSEPH DAVIS,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engine, tackle, cargo, gear, and apparel,

Respondents,

-and-

TODD SHIPYARDS CORP.,

Third Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Reason for Granting the Writ 2

Statement 3

Facts 5

POINT I Under The Prevailing Authorities Petitioner Is Entitled To The Protection Of The Warranty Of Seaworthiness. 7

POINT II — Res Ipsa Loquitur Applies To The Shipowner In Control Of A Vessel And Its Appurtenances. 13

Conclusion 16

Cases Cited

Page

The Anaces, 93 F. 240 (4th Cir. 1899) 15

The Barnstable, 1901, 181 U.S. 464, 21 S.Ct. 684 15

The Bulley, 138 F. 170 (S.D.N.Y. 1905) 15

The Carolina, 32 F. 112 (C.C.E.D.N.Y. 1887) 15

The Cristobal Colon, 44 F. 803 (F.D. La. 1890) 15

Delome v. Union Barge Line Co., 444 F. 2d 225 (1971) ... 12

The Elton, 83 F. 519 (4th Cir. 1897) 15

The General De Sonis, 179 F. 123 (W.D. Wash., 1910) 15

Gilmore & Black, The Law of Admiralty, p. 494 15

Grisby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (1969) (11) p. 1030 15

Jackson v. Lykes Bros. S.S. Co., Inc., 1967-386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488, at Note 4 13

Johnson v. Oil Transport, (440 F 2d at 115) 15

Johnson v. U.S., 333 U.S. 46; 68 S.Ct. 381 15

Morrell v. United States, (1960, D.C. Cal.) 193 F.S. 705, aff'd (CA 9) 297 F. 2d 662 13

North American Dredging Co. v. Pacific Mail S.S. Co., 185 F. 698 (9th Cir. 1911) 15

Pinion v. Mississippi Shipping Co., (1957, D.C. La.) 156 F.S. 652 13

Pioneer S.S. Co. v. Hill, (1955 CA6 Ohio) 227 F.2d 262 .. 13

Pope Talbot v. Hawn, 346 U.S. at 412-413, 745 S.Ct. at 206-207 L.Ed. at 152, 153 5

Read v. United States, (1953, CA 3 Pa) 201 F. 2d 758 13

Reinman v. A.H. Bull S.S. Co., (1952 D.C. Pa) 107 F.S. 153, aff'd. (CA 3) 216 F 2d 939 13

Ress v. The Zieland, (1957 CA 4 Va) 240 F2d 820 13

Rice v. New York Top Rock Corp., 198 F.S. 346, aff'd. petition of Rice, 294 F.2d 272 (3, 5) 15

Rogers v. United States, 452 F2d, 1149 (1972) 7

Seas S.S. Co. v. Sieracki, (328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) 3

The Stamford, D.C.S.D.N.Y. 1929, 35 F. 2d 55 15

The State of Maryland, 85 F.2d 944, 1936 A.M.C. 1515: (4th Cir. 1936) 15

Union Barge Line Corp. v. Allen, 293 F.S. 1004 (E.D. La. 1965) affd. 361 F.2d 217 (5th Cir. 1966) cert. den. 385 U.S. 1006, 875 Ct. 713, 17 Led. 2d 545 (1967) 9

Statute Cited

Page

28 U.S.C.A. Sec. 1254(1) 2

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1973
NO.

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Respondents,

-and-

TODD SHIPYARDS CORP.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on the 24th day of October, 1973.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of NewYork was entered February 1, 1973.

JURISDICTION

The judgment of the Court of Appeals was entered October 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1) Where a vessel is in navigation and is under the complete control of its master, officer and crew, may a shipyard worker, engaged in routine maintenance and inspection work thereon, be deprived of the historic protection of the shipowner's warranty of seaworthiness when accidentally injured by an appurtenant part of the vessel without any explanation by the shipowner or inquiry by the court?

2) Whether res ipsa loquitor may be invoked against the vessel under circumstances where in-rem jurisdiction has been perfected; and, the shipowner is deemed to be in control thereof, but provides no explanation for the accident.

REASON FOR GRANTING THE WRIT

1. The decision is in conflict with the holding of the Circuit Court of Appeals for the Fifth Circuit under a similar factual situation; and, is contrary to the authorities extending the seaworthiness doctrine to shore based workmen performing

ordinary maintenance and inspection or minor repairs aboard a ship deemed to be in navigation.

2) The Circuit Court of Appeals has imposed an unwarranted and unprecedented limitation over the protection provided by the Sieracki[1] doctrine, heretofore not contemplated, but which should be resolved by this Court as follows:

a) That the specific detail of petitioner's job, rather than the overall extent of the shipyard work is determinative.

b) That routine maintenance and inspection work and minor repairs on the vessel herein was sufficient to deprive workmen of the warranty of seaworthiness, for injuries sustained from an appurtenance of the vessel after the completion of the work involved.

3) The court below erroneously failed to make a finding in rem liability against the vessel, despite the fact that there was no testimony on the ship's behalf to explain why or how the accident happened.

STATEMENT

The petitioner was permanently injured and totally disabled by the propeller of the S/S Export Commerce when it fell upon him off the tail-shaft accidentally and without explanation while petitioner was standing on a scaffold after having completed his job assignment on the tail-shaft which involved the loosening of

1. *Seas S.S. Co. v. Sieracki*, (328 U.S. 85, 66 S.Ct. 872, 90 L. Ed. 1099 (1946.)

the grip or seizure of the propeller hub thereon.

For this purpose and other maintenance and routine inspection work the vessel was in the Todd Shipyard for a total of approximately two days, with a full complement of men, officers and its master aboard.

A libel in rem and in personan was perfected against the vessel and the shipowner on the basis of unseaworthiness and negligence; and the shipowner, in turn, impleaded the Todd Shipyard.

The district court proceeding in admiralty without a jury concluded that the routine inspection and maintenance work on the vessel, particularly the specific details of the work of the petitioner thereon, as well as the tools employed, were sufficiently specialized to withdraw it from activities entitling workers to the warranty of seaworthiness; that it was a shipyard kind of work, on the vessel, rather than of the ship, and work by outsiders and not by the crew, and which could not be done at sea.

There simply are no cases reported in any of the Circuit Courts of Appeal throughout the United States, or in any other Federal District Court, that have been decided on the grounds used by the Court below herein; and, therefor, along with the consequent erroneous rational of the Court regarding the application of the doctrine of res ipsa loquitur, the petitioner has been effectively deprived of the benefits of the customary judicial proceedings in law to which he is entitled, in asserting his in rem and in personam claim of negligence and unseaworthiness against the vessel and the shipowner as a result of the unexplained accident or occurrence.

Clearly, the circumstances resulting in the unexplained accident or occurrence which resulted in petitioner's injuries were brought into play proximately by an unsafe condition of both the propeller and the tail-shaft from which it fell; insofar as petitioner was not engaged in working thereon at the time he was injured and the record reflects that a propeller had never fallen off a tail-shaft at Todd under the conditions herein; and, that additional force, always, had to be applied, under normal conditions, after the petitioner's detail of the work had been completed.

The percuriam affirmance by the Circuit Court of Appeals is unprecedented and an unwarranted reversal of the historic policy of this Honorable Court to expand the Sieracki doctrine for the protection of all maritime workers subjected to the same dangers entailed in their respective jobs.[2]

FACTS

The S/S Export Commerce was at the Todd Shipyard from 0548 June 29, 1970, until 0600 July 1, 1970; a period of approximately two days, for the purpose of a routine, periodic, maintenance and inspection and very minor repairs; and, prior to that time, had been actively engaged in commerce.

Admittedly, the vessel was in navigation at all pertinent times and was under the complete control of its owners, agents, representatives or employees, and the master, officers and crew

2. *Pope Talbot v. Hawn*, 346 U.S. at 412-413, 745 S.Ct. at 206-207 (98 L.Ed. at 152, 153).
Jackson v. Lykes Bros. Steamship Co., Inc., 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488. At Note A.

thereof; albeit, control is only admitted to the extent that a full complement of men were assigned to the vessel and were on the payroll with normal duties being performed, logs kept, watches stood; and, that a night mate and night engineer were aboard; and, further, that the vessel was fully operational respecting its steam boilers, generators, machinery, plant, and equipment, generally.

Petitioner was injured by the falling propeller of the vessel at approximately 2000 hours on June 29, 1970, after having completed his function of preparing the propeller and tail-shaft for inspection; and, while he was standing on the scaffold thereat.

At the time petitioner was engaged on the tail-shaft outside the vessel at the stern thereof, another crew of machinists were simultaneously engaged inside the vessel on the tail-shaft preparatory to drawing the same into the shaft alley; and the two crews coordinated their efforts. There was nothing used or precautions taken to prevent the propeller from slipping off the tail-shaft.

The vessel left the shipyard just two days after entering for the minor repairs and inspection involved.

Additionally, in accord with the work contract between Todd Shipyard and the vessel owners, the Shipyard was obligated to perform the minor, periodic, maintenance work, repairs and inspection in a workmanlike manner and, were to be legally responsible for any defective workmanship and damages, otherwise, for personal injuries as a result thereof (Petitioner's Exhibit (1) on the trial).

POINT I

UNDER THE PREVAILING AUTHORITIES PETITIONER IS ENTITLED TO THE PROTECTION OF THE WARRANTY OF SEAWORTHINESS.

The S/S Export Commerce was continually in the service of ocean shipping and transportation prior to undergoing the two days of minor repairs, maintenance and inspection at the shipyard; and, immediately resumed these activities upon completion of the two (2) days of repairs.

In a similar case involving personal injuries sustained in the drydocking of a public vessel of the United States for ten (10) days, the USNS Redstone, in the case of *Rogers v. United States*[3], the District Court concluded that, (a) the vessel was not in navigation at the time of injury, (b) the plaintiff Rodgers was not performing seaman's type work, and (c) the ship was under the control of the Shipyard; and, dismissed the case.

The Court sub judice came to the identical conclusions and erroneously dismissed the libel herein, upon the same grounds.

The Circuit Court of Appeals for the Fifth Circuit however, in the *Rodgers* case, *supra*, reversed and remanded the case.

In reversing the lower Court the Fifth Circuit Court held as follows:

> "It is now well settled that the warranty of seaworthiness may extend to shore based repair workers. The

3. 452 F2d. 1149 (1972).

Tungus v. Skougaard, 1959, 358 U.S. 588; *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406. To determine whether the warranty is owed to Rodgers we must focus ".....upon the status of the ship, the pattern of repairs, and the extensive nature of the work contracted to be done,....." *West v. United States*, 1959, 361 U.S. 118, 122; *Delome v. Union Barge Line Co.*, 5 Cir. 1971, 444 F2d. 225, 231. Applying the facts to this test we find that the REDSTONE was in navigation and that Rodgers was performing work traditionally engaged in by seamen.

In the case at bar, on the S/S Export Commerce, there was no extensive work or major overhaul done; and, surely, there was only a fraction of the work performed that was done upon the REDSTONE (costing $91,142.); insofar as the REDSTONE was in the shipyard for ten days, whereas the "Export Commerce" was in the Todd Shipyard for only two (2) days at a comparative cost of $29,000.

In the *Rodgers* case, *supra*, the Court continued its reasoning as follows:

p. 1152, [4,5]

"Roper teaches that "the test for determining whether a vessel is in navigation is the 'status of the ship', *West v. United States*, 361 U.S. 118, 122 (1959)."

In *West* the ship had been in "moth-balls" and was undergoing renovation to make her seaworthy again. Because of the magnitude of the undertaking and the fact that the contractor had complete control of the ship for this purpose, the Court held that the ship was not in maritime service (navigation). Here, the REDSTONE, far from being in moth-balls prior to undergoing repairs, was actively engaged in maritime commerce and immediately

resumed these activities upon completing ten days of repairs."

The Todd Shipyard in this case was engaged for only two days by the shipowner; and, in addition, the Court below acknowledged that the S/S Export Commerce was in navigation at the time petitioner suffered his injuries.

The Fifth Court of Appeals in *Rodgers, supra,* said:

p. 1152, [4,5]

".....The repairs are similar to those in *Union Barge Line Corp., v. Allen,* E.D.La. 1965, 239 F.S. 1004, aff'd. 5 Cir. 1966, 361 F.2d 217 and *Lawlor v. Socony-Vacuum Oil Co.*, 2 Cir. 1960, 275 F. 2d 599, cert. den. 363 U.S. 844. They are not sufficient, in legal contemplation, to take the ship out of navigation."

The similarity between the petitioner's case and the case of *Union Barge Line Corp. v. Allen,*[4] *supra,* is even greater than in the *Rogers* case, *supra.*

The claimant Allen was working on the tail-shaft of the vessel when he was injured in the capacity of a machinist engaged in removal of the tail-shaft for replacement of a sleeve-bearing, and the "Allen" job required the removal of the propeller as well; Joseph Davis the petitioner, was also working on the tail-shaft of the vessel for the purpose of loosening the propeller and removal of the tail-shaft for inspection.

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4. *Allen v. Union Barge Lines, Inc.*, 293 F.S. 1004 (E.D. La. 1965) affd. 361 F.2d 217 (5th Cir. 1966) cert. den. 385 U.S. 1006, 875 Ct. 713, 17 Led. 2d 545 (1967).

No two jobs could have had a greater similitude; furthermore, any valid distinction, if at all, "in legal contemplation" would redound, obviously, to the benefit or advantage of the petitioner; for, he was not injured as a result of a fall from a defective shipyard scaffold timber or plank, as Allen was; but, on the contrary, by an appurtenant part of the vessel itself, namely, the propeller.

In the *Allen* case, *supra*, the District Court held, 239 F.S. 1008 (1965) [6] 4.

> "After considering all of these elements, the Court concludes as a matter of law, that in view of the pattern of the repairs and the nature of the work to be done by both Dravo and the engineering crew aboard, the M/V Mariner was a vessel in navigation at the time of libelant's injury; that libelant was performing work traditionally performed by seamen (removing a bearing from a propeller shaft); and, that he was, at the time of his injury, entitled to the warranty of seaworthiness. *Lawlor v. Socony-Vacuum Oil Co., supra.*"

Whether a machinist is engaged to loosen a propeller or a sleeve-bearing from the tail-shaft of a vessel, this Honorable Court has provided the same protection of the warranty of seaworthiness to all similarly employed, without any distinction whatever, because both jobs entail the same hazards or inherent dangers; and, men employed in this capacity are fundamentally entitled to equal rights under the laws of admiralty.

It is patently inequitable, to say the least, to hold, as in this case, that a machinist, engaged in the removal of sleeve-bearings from a tail-shaft of one ship, is protected by a shipowner's warranty of seaworthiness; but, that a machinist engaged on

another vessel, in merely loosening a propeller on a similar tail shaft, is not and cannot be protected.

This is not the kind of distinction or differentiation in personalities or work areas that American Jurisprudence entertains; particularly within the Admiralty Courts of the United States.

The Court below preferred to decide against the petitioner on just such an inequitable basis, merely by a laborious dissertation of the specific type of work done by petitioner herein; patently, in a strained effort to classify it as specialized, in order to justify a deprivation of petitioner's valid claim; albeit, as the record reflects, no special skills or tools were required in any case. Capt. Swenson testified that any able bodied seaman could do the job. (Op. A-118)

The *Rodgers* Court, *supra*, stated:

P. 1153 [7,8]

"The mere fact that the shipowner contracts work to a third party in order to take advantage of the skill brought about by the modern division of labor does not release him from his responsibility of providing shore workers with a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 1946, 325 U.S. 85, 100". . . . "Applying the *West* test we must look to the pattern of repairs and the extensive or limited nature of the work contracted to be done rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of the injury in determining whether the work was traditionally that of a seaman. *Delome v. Union Barge Line Co., supra*, at 232; *Johnson v. Oil Transport Co., supra*, at 117; *Watz v. Zapata Off-Shore Co., supra*, at 108.

In *Delome v. Union Barge Line Company*, 444 F 2d 225 (1971) p. 231, par. B, the Court stated:

> "To determine whether a warranty of seaworthiness is owed shoreside workers, examination of three status-oriented factors becomes essential. We focus on "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore based workmen is doing at the moment of injury." *West v. United States*, 1959, 361 U.S. 118, 122, 80 S.Ct. 189, 192, 4 L.Ed. 2d, 161, accord, *Watz v. Zapata Off-Shore Co.*, 5th Cir. 1970, 431 F. 2d 100, 108; *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra*, 402 Fed. 2d at 240.

On page 232 the Court continued:

> ".....Nevertheless, a vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation for the purposes of the warranty. See *Drake v. E.I. Dupont de Nemams & Co.*, 5th Cir. 1970, 432 F. 2d 276, 277-278; *Martin v. Jones*, E.D. La. 1968, 296 F.S. 878, 881; *Rodgers v. M/V Ralph Ballniger, supra, Allen v. Union Barge Line Corp., supra*, 239 F.S. at 1007; *Hilton v. Aegean Steamship Co., supra.*"

The petitioner's Exhibit (1) on the trial in the district court indicates that only minor repairs were performed on the S/S Export Commerce; and, it is not disputed that the vessel was in the Todd Shipyard temporarily, for the routine, periodic, maintenance and inspection work, and, thereafter, immediately returned to sea and was actively engaged in commerce.

Where minor repairs are involved, as in this case, since the vessel was in drydock for only two days, clearly, the injured shore-worker is protected by the warranty of seaworthiness.[5] Furthermore, this Honorable Court has indicated that the Sieracki doctrine should be expressed expansively.[6]

POINT II

RES IPSA LOQUITUR APPLIES TO THE SHIPOWNER IN CONTROL OF A VESSEL AND ITS APPURTENANCES.

The Court below erroneously held that the minor repair work on the S/S Export Commerce was under the sole supervision of the Todd Shipyard, on its own drydock; and, that if res ipsa loquitor were to be invoked, it would be directed to Todd and not the ship. (Op. A-50).

Yet the Court below failed to apply the doctrine either to the shipowner or to the shipyard, holding that,

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5. *Third Circuit—Read v. United States,* (1953, CA 3 Pa) 201 F 2d 758; *Reinman v. A.H. Bull S.S. Co.,* (1952 D.C. Pa) 107 F.S.153, aff'd. (CA 3) 216 F 2d 939;

Fourth Circuit—Ress v. The Zieland, (1957 CA 4 Va) 240 F 2d 820;

Fifth Circuit—Pinion v. Mississippi Shipping Co., (1957, D.C. La.) 156 F.S. 652.

Sixth Circuit—Pioneer S.S. Co. v. Hill (1955 CA6 Ohio) 227 F 2d. 262;

Ninth Circuit—Morrell v. United States, (1960, D.C. Cal.) 193 F.S. 705, aff'd (CA 9) 297 F 2d. 662.

6. *Jackson v. Lykes Bros. S.S. Co. Inc.,* 1967—386 U.S. 731, 87 S.Ct. 1419, 18 L. Ed. 2d 488, at Note 4.

"Where, as in *Gibbs v. Kiesel*, 5th Cir. 1967, 382 F 2d 917, 'unexplained' accident is found to disclose unseaworthiness, the terms of the accident are such as to imply a defect in structure. (as in *Oliveras v. American Export Isbrandtsen Lines*, 2 Cir. 1970 431 F 2d 814), (Op. A-50) or, as in *Gibbs*, a defect in rig. Here, the accident implies nothing of defect; no inference of structural defect nor of operational misconduct that could produce the event arises from its happening....."

This holding establishes gross error, for it conflicts with the record, insofar as testimony by Todd's foreman, La Garde, indicates that propellers do not fall off by themselves when loosened; but, must, under *normal* conditions, be jacked or forced off the tail-shaft of a vessel, after they have been loosened as the propeller was in this case.

It is, therefore, inescapable that the propeller fell off the tail-shaft by reason of some latent defect, and, the shipowner, having provided no explanation whatever, should have been held liable for breach of warranty of seaworthiness by the Court below. Nevertheless, the Court made no inquiry whatever, in this regard.

In *Rodgers v. U.S., supra*, the Court said:

P. 1152 [4,5]

".....Even if the yard workers had control over the particular area where they were working, and, here they did not, the warranty survives when the owner remains in general control of the vessel. *Johnson v. Oil Transport Co., supra*, at 114; *Lawlor v. Socony Vacuum Oil Co., supra*, at 604."

In this case, there is no relinquishment of control, whatever, because the shipowner was actively engaged in conducting his own repairs with his own complement of men, hired welders, etc., as shown by petitioner's Exhibit 1, on the trial; and, the Court below completely *ignored this vital fact* regarding the res ipsa doctrine.[7]

Additionally, the fact that in rem jurisdiction had been perfected against the vessel, the Court below was obliged to require the shipowner to provide an explanation for the accident; and, its failure to inquire in this regard, coupled with the neglect of the shipowner to provide any explanation whatever, created a presumption of unseaworthiness against the vessel for which the shipowner must be held liable. See *Johnson v. Oil Transport*, (440 F 2d at 115 (3) footnote 6).[8]

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7. See generally *Johnson v. U.S.*, 333 U.S. 46; 68 S.Ct. 381.

8. *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011 (1969) (11) p. 1030.

Rice v. New York Top Rock Corp., 198 F.S. 346, aff'd. petition of Rice, 294 F.2d, 272 (3,5) at 275.

Gilmore & Black, The Law of Admiralty, p. 494; *The Barnstable*, 1901, 181 U.S. 464, 21 S.Ct. 684; *The Stamford*, D.C.S.D.N.Y. 1929, 35 F. 2d. 55.

North American Dredging Co. v. Pacific Mail S.S. Co., 185 F. 698 (9th Cir. 1911); *The Anaces*, 93 F. 240 (4th Cir. 1899); *The Elton*, 83 F. 519 (4th Cir. 1897); *The Carolina*, 32 F. 112 (C.C.E.D.N.Y. 1887); *The State of Maryland*, 85 F. 2d 944, 1936 A.M.C. 1515; (4th Cir. 1936; *The Bulley*, 138 F. 170 (S.D.N.Y. 1905); *The General De Sonis*, 179 F. 123 (W.D. Wash. 1910) *The Anaces*, 93 F. 240 (4th Cir. 1899); *The Cristobal Colon*, 44 F. 803 (F.D.La. 1890).

CONCLUSION

The petitioner was injured by an appurtenance of the S/S Export Commerce while in navigation and under the possession, management and control of the shipowner, and was entitled to the protection of the warranty of seaworthiness, because he was engaged in minor repairs, not requiring special skills, and routine, periodic, maintenance and inspection work.

JACOB RASSNER
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On the brief

SUPREME COURT, U.S.

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MICHAEL RODAK, JR., CLERK

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-and-

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TABLE OF CONTENTS

	Page
Opinion in District Court	A-1
Order of Circuit Court Affirming	A-13

Opinion in District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSEPH DAVIS,
Plaintiff,

-against-

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Defendants.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Third-Party Plaintiff,

-against-

TODD SHIPYARDS CORP.,
Third-Party Defendant.

JACOB RASSNER, Esq., for Plaintiff.

DAVID P.H. WATSON, Esq. (Messrs. HAIGHT, GARDNER, POOR & HAVENS, of Counsel) for Defendants and Third-Party Plaintiffs.

THOMAS H. HEALEY, ESQ. (Messrs. DARBY, HEALEY, STONEBRIDGE & WHELAN, of Counsel) for Third-Party Defendant.

DOOLING, D.J.

Plaintiff, an employee of the Third-Party Defendant Todd, was seriously injured on June 29, 1970, while he was working as a machinist about the task of pulling the tailshaft and replacing the propeller of the S.S. Export Commerce. The plaintiff's injury was sustained at about 8 P.M. on June 29, 1970, when the propeller of the vessel, which had been "jumped" on the tailshaft and was resting on it, unexpectedly slid off the tailshaft, struck the staging on which plaintiff and his co-worker Olenyk were working and knocked them down to the deck of the drydock some dozen or 15 feet below. Plaintiff charges the ship with unseaworthiness and the shipowner with negligence.

While the vessel was in drydock, there is no claim that it was out of navigation. The defendants however do contend that plaintiff was not entitled to the warranty of seaworthiness, that no unseaworthy condition was shown and that no negligence on the part of the ship or shipowner was shown.

The Export Commerce arrived at drydock No. 8 at Todd Shipyard at 5:40 in the morning of June 29. It was in the drydock and on the blocks by 8:20 in the morning and the drydock itself was dry at 9:45 in the morning. The vessel was at Todd for routine maintenance, including drawing the tailshaft, which carries the propeller or wheel, into the hull through the tube communicating through the skin of the ship, so that the shaft could be put through its triennial A.B.S. inspection and Coast Guard check. The wheel was being replaced at the same time by a reconditioned wheel.

As the case turns on the process by which a wheel is detached from the tailshaft so that the tailshaft can be pulled into the vessel for inspection, the process has to be described in some detail.

The propeller or wheel of the S.S. Export Commerce weighed about 47,000 pounds. The shaft to which it, in this respect

similar to other propellers, was fastened had taper throughout that part of the tailshaft which would be covered by the hub of the propeller when the propeller was in place. Beyond the outer edge of the hub of the propeller the "bitter-end of the shaft was threaded to take a large nut of special configuration which weighed from 500 to 1000 pounds. In addition there was a fairwater cap which fitted up against the outer end of the hub of the propeller and was rounded and tapered so as to present a streamlining structure, like a rounded cone. The cap is bolted to the hub by means of bolts which are threaded into the hub (in a fore and aft direction) and extend into the cap and emerge in recesses in the cap in which the nuts that fasten to the outer end of the bolts can be seated. When the cap is fastened down to the hub the recesses in which the nuts are seated are then cemented up.

To get the propeller off the shaft the procedure is first to knock the cement out of the cap recesses so as to expose the nuts, undo the nuts, remove the cap and then start to take off the big nut at the bitter end of the tailshaft. A special wrench is used for this which is not adjustable but is, in effect, custom made for each shaft — so much so that a vessel carries that wrench with it as part of its gear. When the cap is off, it is then necessary to get the propeller itself to let go of the tailshaft.

It has been said the tailshaft is tapered throughout that part of its length which is embraced in the depth of the hub. When the propeller is put on the shaft it is driven home and is retained in place during service at sea in some very considerable part by the tightness of the annular grip of the propeller on the taper of the tailshaft. The propeller is prevented from slipping on the shaft when the shaft is driving it by a key and keyway. The nut applied at the bitter end of the shaft of course is also an element in fastening the propeller to the tailshaft. The propeller is brass or bronze throughout and the tailshaft is a hardened steel so that

the interface between propeller and shaft is bronze to steel. The hub of the propeller is fitted with threaded holes running fore and aft and parallel with the tailshaft; they are exposed to view when the fairwater cap has been removed. Into the threaded holes can be inserted "drawbolts" which are threaded at both ends, and which are longer than the protruding bitter end of the tailshaft. When the cap has been removed, the draw-bolts are inserted into the hub of the wheel; they protrude aft, parallel to the bitter end, and they extend beyond the outermost extremity of the bitter end of the shaft. Beyond the bitter end a strong-back is then fitted which bridges across from one draw-bolt to the other, and nuts are placed at the outer end of each draw-bolt to hold the strongback in place across the butt or bitter end of the shaft. Then in between the outer extremity of the bitter end of the tailshaft and the inner face of the strongback is inserted a box wedge, an expandable wedge assembly into which a wedge can be hammered so as to put strain on the draw-bolts and hence to set up a parting strain between the strongback and the butt or bitter end of the shaft, so that as the wedge is driven into the box wedge the draw-bolts pull on the hub of the propeller so as to break the seal between the propeller and the tailshaft.

The evidence is reasonably clear, subject to what is said later with respect to the testimony of Captain Swensson, that ordinarily the mere application of turning or wedging force to the ends of the draw-bolts would not suffice to pull the propeller bitter end of the tailshaft. When the cap has been removed, the draw-bolts are inserted into the hub of the wheel; they protrude aft, parallel to the bitter end, and they extend beyond the outermost extremity of the bitter end of the shaft. Beyond the bitter end a strong-back is then fitted which bridges across from one draw-bolt to the other, and nuts are placed at the outer end of each draw-bolt to hold the strongback in place across the butt or bitter end of the shaft. Then in between the outer extremity of

the bitter end of the tailshaft and the inner face of the strongback is inserted a box wedge, an expandable wedge assembly into which a wedge can be hammered so as to put strain on the draw-bolts and hence to set up a parting strain between the strongback and the butt or bitter end of the shaft, so that as the wedge is driven into the box wedge the draw-bolts pull on the hub of the propeller so as to break the seal between the propeller and the tailshaft.

The evidence is reasonably clear, subject to what is said later with respect to the testimony of Captain Swensson, that ordinarily the mere application of turning or wedging force to the ends of the draw-bolts would not suffice to pull the propeller off the tapered tailshaft by sheer mechanical force. The practice, therefore, is to apply heat to the bronze hub for a period from ten minutes to perhaps as much as an hour so that the hub expands with the heat more quickly than the tailshaft. At a point the strain exerted through the strongback and box wedge assembly can start or jump the propeller on the shaft, breaking the annular grip of the hub on the shaft. That step of finally getting the propeller to budge along the shaft is called "jumping" the wheel. The evidence is that the jump is modest, say a quarter of an inch and not more than a half inch. The grip of the propeller on the shaft, that is, is broken but the propeller does not slide off in ordinary experience.

The next step is to secure the propeller so that the tailshaft can be drawn out of the hub and into the hull for inspection, leaving the propeller suspended. Usually wires or wire straps are wound round and round the hub and fastened to chains, which in turn are fastened to padeyes fixed in the hull of the vessel above the propeller and under the ship's counter or quarter. The padeyes or eye pads are designed for the sole purpose of supporting the propeller in a chain and wire arrangement for the required periodical drawing of the tailshaft for inspection, as

well as for inevitable occasions of wheel replacement. (There are two other padeyes or eye pads similarly disposed under the counter to support the rudder when it has to be removed.)

One question in the present case is, was the usual, or customary, and correct procedure used in jumping the wheel? That is, should the wheel be secured by chains to the overhead padeyes, or otherwise secured against movement on the shaft, before the wheel is "jumped", so as to prevent it from sliding off the tailshaft, or should it not? An alternative to chains in the overhead padeyes, it is intimated, was preventer chains of lighter weight — that could not support the whole weight of the wheel — fastened to the same part of the drydock and supposedly adequate to prevent the wheel's moving and slipping off the tailshaft. In the present case neither of these steps was taken.

The testimony is that on the night in question the procedure had been carried to the point where heat had been applied to the hub by plaintiff and his fellow machinist, Danny Olenyk, the strongback was in place, the box wedge was in place and the wedge had been hammered home to put strain on the wheel. The wheel had "jumped", and not any unusual distance so that the jump was some quarter to half an inch, and the wheel remained on the shaft. For an unexplained reason, according to plaintiff's evidence, a delay of ten minutes ensued while plaintiff and Olenyk awaited the rigger crew which would attach the chains to the wheel with the wire rig. For no evident reason and before the riggers came, the wheel slid off the shaft, struck the staging and knocked plaintiff and Olenyk to the deck.

Plaintiff testified that in the interval of waiting he removed or started to remove one of the draw-bolts from the strongback, but there is a substantial question as to whether this is a rationalization or reconstruction on his part, for he had not testified to that during the taking of his deposition. On the contrary, his testimony appeared to exclude his having any

recollection of any such occurrence, and his testimony about it was at best somewhat uncertain.

The evidence is that the chains had already been fastened to the padeyes above the propeller under the ship's counter but had not yet been wired to the propeller. The testimony is that there were no other preventer chains, nor any other means employed to prevent the propeller from slipping aft. The evidence is that the nut had been completely removed, and that it had not just been loosened and turned back enough to allow the wheel to jump without going off the end.

Plaintiff introduced no expert testimony to illuminate the physics of the problem. Plaintiff rather introduced, as testimony of the usual practice, his own testimony, and that of a fellow employee, Ernest Jackson, that of Captain Julius F. Swensson and that of Earl LaGarde. Mr. LaGarde, a Todd employee, testified that the procedure, as described by the evidence, was standard procedure followed in 90 or 99 cases out of a hundred. He was clear that a jumped wheel does not move more than a quarter inch to a half inch or so at most, and that it is expected — on an empirical basis — to start about a quarter inch. He testified that the overhead chains used to support and lower the wheel after it has been started and the shaft drawn, are not wired to the wheel during "jumping" because the intense heat in which the blowtorches envelop the hub is too great for the wire cable; he indicated that the heat would so weaken the wire winds or straps as to render them unsafe for supporting the 23-1/2 ton wheel. LaGarde explained that there was so much room between the outer or aft edge of the strongback and the inner edge of the rudder that the wheel can fall off, that the yard cannot rely on the strongback and wedge box assembly to act as a stopper between the bitter end of the shaft and the rudder.

Captain Swensson had been going to sea since 1903 and had shipped in steam since 1928; he held a Master's ticket good for all seas and all ships; he had been a shipowner as well as a shipmaster. Although he is not himself skilled in engineering matters or in jumping propellers, he had seen the operation performed a number of times. He testified to the use of chains to support the propeller during the jumping procedure at sundry shipyards, but his testimony was principally, if not exclusively, about cold jumping of the wheel without use of any heat. He testified that in these instances the yard jumped the rudder by applying wedge block and draw-bolt strain alone. He said that he saw heat used in one case in Marseilles in 1966 and had seen it used three or four other times to ease an assembly before jumping, but he was unclear as to whether or not the procedure involved was like that described by Mr. LaGarde.

Mr. Jackson, and to a somewhat uncertain extent the plaintiff himself, testified that Todd in its regular practice did not use the overhead chains and wire rigging to restrain the propeller until after the "jump", and that Todd did not use them during the heating process, to this extent agreeing with LaGarde. But they appeared to say that other, much lighter chains were applied fore and aft of the propeller before the heating to contain linear movement on the jump; Mr. Jackson indicated that the chains that he was talking about would have been secured to padeyes on the drydock wall and/or to the drydock keel support blocks below the propeller. There was no evidence that there was at any time any practice of simply loosening the nut at the bitter end of the tailshaft by an amount roughly equal to the expected jumpas a means of limiting the jump of the wheel.

The testimony on this point of plaintiff and Mr. Jackson must be rejected. It was unimpressive in itself. Moreover, the plaintiff's answers to interrogatories 6 and 7 of the third-party

defendant contain no reference to the point, and it is not included in the fully drafted fault allegations of paragraph ELEVEN of the complaint. Plaintiff's contention that preventer chains were normally used must be rejected.

It is concluded that the practice adopted and used without material exception at Todd was used on the occasion of the accident and that plaintiff has not shown that it is in any way negligent or inadequate or that it created a condition of transitory unseaworthiness.

There is no evidence that the shaft or the wheel, the hub, the fairwater cap or any other part of the assembly had any defect in design or assembly or in condition.

The defendants contend that plaintiff is not in any case entitled to the warranty. Captain Swensson testified on the question of whether or not the work of jumping a wheel could be considered traditional seaman's work, even if at the present day it may be done by specialist landside teams. The Captain's testimony demonstrated the opposite of plaintiff's contention. It appears that ships engaged in foreign trade often or usually carry spare propellers with them to facilitate replacement in foreign ports, and it also appears that normally a vessel will carry a wrench to fit the nut for the bitter end of the tailshaft. Beyond that the other equipment necessary to change a wheel is not carried on shipboard. The blow-torches used to heat the hub, the evidenced shows, are outsize, heavy-duty heaters capable of encasing the wheel hub in intense heat, and the evidence intimates that the ordinary welding blowtorches that could expectably be aboard freighters could not lift a hub to jumping temperature because of the heat loss from the wheel surface. Captain Swensson indicated that strongbacks were not unknown on shipboard, and there was an indication that each wheel has its own draw-bolts that were used on the Export Commerce, and those of many other vessels, were kept in store at Todd and were

not on shipboard. The strongback used was Todd's, the box wedge used was Todd's, and the evidence suggests, and there is no contrary evidence, that all this equipment was kept normally in the shipyard and not aboard ship.

No one knew of a case in which a ship's crew had jumped a wheel. Captain Swensson went only so far as, in effect, to say that he couldn't see any particular reason why a crew could not undertake the job. He said no more than that any crew of ablebodied handymen could do the job under right supervision. Indeed there appears to be only one instance in which a propeller was reportedly changed by a ship's crew, and the incident was remarkable enough to become a little legend.

The conclusion is inevitable that the jumping of a wheel was not ship's work or crew work either in tradition or in current practice. In this situation, no help is gained by reference to an extended concept of crew work which would define it in terms of the overall nature of the whole job undertaken at Todd and de-emphasize the nature of the subordinate activity within that whole. In a generalized sense drawing a tailshaft is related to ship maintenance and certification, but it is not an operation that could normally be done at sea, and is sufficiently specialized to remove it from the class of activities analogous to crew activities and in that sense entitling the workers involved in it to the warranty of seaworthiness. It is peculiarly a shipyard kind of work, is work on the vessel rather than work of the ship, and work done by outsiders to the vessel and not crew work normal to the ship.

Finally, there is no evidence that the shipowner and the ship's crew were aware of or competent to form a judgment about the operation involved. Unquestionably the entire ship's crew was still assigned to the vessel, and they were on the payroll throughout the entire but brief stay of the vessel at Todd. That fact has much to do with regarding the ship as still in navigation

but nothing to do with whether or not error in the pursuit of the work of jumping the wheel involved or could involve any negligence on the part of the ship. The work was wholly committed to Todd and the interest of the vessel owner and those in responsible charge of the vessel was not in the performance, direction or supervision of the work, but only in checking the adequacy of Todd's completed performance of it. The shipowner, and those others responsible for the ship's safety at sea, would have an interest in seeing that the shaft was in good order and the wheel properly restored to the shaft, just as would the certifying authorities. But they would not have either a right or duty nor would they have the skill to participate in or to direct the execution of the work. What might have been the responsibility of ship's crew if they had seen something done which manifestly endangered someone in plaintiff's oosition is not raised by the case. There was no evidence that any ship's crewman was on hand at the time, or either was or should have been in a position to have observed the existence of the condition involved, or to have understood whether or not a danger was present. Neither plaintiff nor Olenyk saw any condition of danger; they did not give any warning.

The accident then is unexplained. The evidence discloses no cause for the slippage of the wheel. No change from the moment of the safe "jump" was referred to except the dubious testimony that plaintiff might have removed or started to remove a drawbolt in the ten minute interval after the jump. Even if *res ipsa loquitur* be invoked, it would not be directed to the ship or its owners but to Todd, which was in charge of the work on its own drydock and under its sole supervision. Where, as in *Gibbs v. Kiesel*, 5th Cir. 1967, 382 F.2d 917, "unexplained" accident is found to disclose unseaworthiness, the terms of the accident are such as to imply a defect in structure (as in *Oliveras v. American Export Isbrandtsen Lines*, 2d Cir. 1970, 431 F.2d 814), or — as

in *Gibbs* — a defect in rig. Here, the accident implies nothing of defect: no inference of structural defect nor of operational conduct that could produce the event arises from its happening. Nothing failed in service, no causative condition or event or mechanics-of-happenings appeared or is inferable. Something may have been done at the time of the accidcent which is lost to recollection. It is certainly not in the evidence. In any case, no cause of action is made out against the ship or its owners.

In the circumstances it would serve no useful purpose to make findings with respect to the plaintiff's injuries, which are totally disabling so far as can be seen, in view of his age, the gravity of the injury, and the absence of any suggestion that any alternative employment is available to him.

It is concluded that plaintiff may not recover and that defendant is entitled to judgment that plaintiff take nothing, and that the complaint is dismissed on the merits.

Questions as between defendant and third-party defendant have been reserved. Both the defendant and the third-party defendant rested when plaintiff rested; defendant and third-party defendant must promptly advise whether they have settled the issues between them so that final judgment can be entered.

It is

ORDERED thst when the case is ready for final judgment on all claims involved the Clerk enter judgment that plaintiff take nothing and that the action of the plaintiff against the defendants is dismissed on the merits.

Brooklyn, New York
November 28, 1972

s/John F. Dooling
U.S.D.J.

ORDER OF CIRCUIT COURT AFFIRMING

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and seventy-three.

Present:

HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

73-1372
Joseph Davis,
Plaintiff-Appellant,

v.

American Export Isbrandtsen Lines, Inc., and S.S. Export Commerce, her engines, tackle, cargo, gear and apparel,
Defendants-Appellees.

American Export Isbrandtsen Lines, Inc.,
Defendant & Third-
Party Plaintiff,

v.

Todd Shipyards Corp.,
Third-Party Defendant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By s/Vincent A. Carlin
Chief Deputy Clerk

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Supreme Court of the United States

October Term, 1973

No. 1020

JOSEPH DAVIS,

Petitioner,

against

AMERICAN EXPORT ISBRANDSTEN LINES, INC., and S. S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel.

Respondents,

and

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF RESPONDENT AMERICAN EXPORT ISBRANDSTEN LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DAVID P. H. WATSON
1 State Street Plaza,
New York, N. Y. 10004
Counsel for Respondent,
American Export Isbrandsten Lines, Inc.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Reasons Why The Writ Should Not Be Granted	2
Statement Of The Case	3
POINT I—Petitioner was not entitled to the warranty of seaworthiness because he was not engaged in work traditionally performed by seamen	6
POINT II—There was no *In Rem* jurisdiction in this case, and petitioner cannot recover under the doctrine of *Res Ipsa Loquitur* because there was no proof that the work on which he was engaged was under the exclusive control of the respondent	11
CONCLUSION	17

Table of Cases

Allen v. Union Barge Line Corp., 239 F. Supp. 1004 (E.D. La. 1965) affirmed 361 F.2d 217 (5 C.A. 1966), cert. den. 385 U.S. 1006 (1967)	10, 11
Jackson v. Lykes Steamship Co., 386 U.S. 731 (1967)	8, 9
Johnson v. Oil Transport Company, 440 F.2d 109 (5 C.A. 1971)	15, 17
Lawlor v. Socony Vacuum Oil Co., 275 F.2d 599 (2 C.A. 1960)	10, 11
Manhat v. United States, 220 F.2d 143 (2 C.A. 1955), cert. den. 349 U.S. 966 (1955)	14
Rogers v. United States, 452 F.2d 1149 (5 C.A. 1972)	3, 9

PAGE

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) .. 3

United Pilots Association v. Halecki, 358 U.S. 613 (1958) 3, 6, 9

West v. United States, 361 U.S. 118 (1959) 3, 8, 9, 13

Other Authorities

Prosser on Torts, Fourth Edition, 1971, chapter 4, page 214 13

Richardson on Evidence, Third Edition, 1964, § 93, page 67 ..... 13, 14

Statutes

Rule C (3) of the Supplemental Rules for Certain Admiralty and Maritime Claims 16

Supreme Court of the United States

October Term, 1973

No. 1020

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BRIEF OF RESPONDENT AMERICAN EXPORT ISBRANDSTEN LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented

We do not agree that the questions presented by petitioner on page 2 of his Petition reflect the facts and legal issues of this litigation.

The Trial Court found as a fact that the work on the ship's propeller and shaft was under the complete control of Todd Shipyard's Corp. and not under the control of the Master, officers and members of the ship's crew. Furthermore, petitioner, far from being engaged in routine ship's maintenance, was engaged in shipyard work which

was found to be outside the scope of work traditionally performed by ship's crews. Accordingly, petitioner's question No. 1 is not pertinent.

Since *in rem* jurisdiction was *not* perfected against this vessel, petitioner's question No. 2 does not apply to this litigation. This case (despite ambiguous imperfections in the framing of the complaint) started as a civil action with a demand for a trial by jury, and evolved into an admiralty *in personam* action when it appeared that there was no diversity of citizenship between the parties such as to sustain the jurisdiction of the District Court on the civil side.

We submit that the real questions presented by the Petition are:

> 1. Was the Trial Court not correct in holding that petitioner had failed to sustain his burden of proving that the respondent was negligent or that its vessel was unseaworthy?
>
> 2. Was the Trial Court not correct in holding that the respondent did not owe petitioner a warranty of seaworthiness because the nature of the overall work on which petitioner was engaged was not work traditionally performed by ship's crews?
>
> 3. Was the Trial Court not correct in holding that petitioner could not recover from the respondent on a theory of *res ipsa loquitur* because petitioner's work on the propeller and tailshaft was not under the exclusive control of the respondent?

Reasons Why The Writ Should Not Be Granted

1. Despite petitioner's contention to the contrary there is no conflict between the holding of this case and holdings of other Circuit Courts of Appeal. More specifically, there

is no conflict between the decision in this case and *Rogers* v. *United States,* 452 F.2d 1149 (5 C.A. 1972), as alleged by petitioner on page 7 of his Petition. The opinions in this case and in *Rogers* v. *United States, supra,* both apply the tests and standards set forth by this Court in *United Pilots Association* v. *Halecki,* 358 U.S. 613 (1958), and *West* v. *United States,* 361 U.S. 118 (1959), for determining whether a worker is entitled to the warranty of seaworthiness. The differences in results are products of different facts and not because of a difference in the standards and tests applied by the two Courts.

2. The decision in this case by the Trial Court and its affirmance by the United States Court of Appeals for the Second Circuit without opinion do not constitute any limitation over or conflict with the principals set forth by this Court in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), bearing on the warranty of seaworthiness owed to workers engaged in work traditionally performed by ship's crews.

3. This litigation does not present an opportunity for this Court to review issues relating to *in rem* liability as they may apply to the doctrine of *res ipsa loquitur,* for the simple reason that there was no *in rem* jurisdiction in this case. No *in rem* jurisdiction was attempted, let alone perfected.

Statement Of The Case

This is an action brought by petitioner, Joseph Davis, to recover money damages for injuries sustained by him on June 29, 1970, while he was working as a machinist in the employ of third-party defendant Todd Shipyards Corp. Plaintiff was engaged in work involving s/s Export Commerce, a dry-cargo freighter owned by respondent American Export Isbrandsten Lines, Inc.

From June 29, 1970, until July 1, 1970 s/s Export Commerce was in Todd's drydock in Brooklyn for routine ship-

yard repairs. The 11th of the 17 items of work which respondent authorized Todd to perform was:

> "Remove propeller, pull shaft for A. B. S. 3 yr. inspection, fit reconditioned propeller and close up in good order." (Plaintiff's exhibit 2)

Petitioner was engaged in the drydock assisting in the removal of the propeller from the tailshaft of the vessel. During the course of this work the ship's propeller, which weighed some 47,000 pounds and had a diameter of 20 feet, fell off the end of the shaft and struck the scoffolding on which plaintiff and another Todd employee were standing causing plaintiff to sustain certain personal injuries.

The ship's propeller was to be removed for routine replacement and to allow the ship's tailshaft to be pulled for periodic inspection in accordance with the requirements of the United States Coast Guard and the American Bureau of Shipping.

Petitioner, who was the only witness at the trial to claim to have been an eye-witness to the occurrence, could not ascribe a reason for the propeller coming off the end of the shaft.

The only witnesses on the trial were those called on behalf of petitioner. Respondent rested at the end of petitioner's case believing that petitioner had failed to establish a prima-facie case and had failed to sustain his burdens of proof.

Petitioner's witness Earl LaGarde, who had been assistant night foreman for Todd on the evening of the accident, testified that he was in charge of the work being performed by Todd on the propeller and shaft of the vessel and testified further that all the equipment being used was obtained from Todd's own gear room. LaGarde was unable to explain the occurrence of the accident. Finally, petitioner called Captain Swensson as his expert witness with the apparent intention of convincing the Court by his testi-

mony that the removal of a ship's propeller and the pulling of a tailshaft were functions traditionally performed by ship's crews. The Trial Court was not impressed by Swensson's testimony, especially since he responded to the question as to whether the removal of a propeller was traditionally the work of a seaman by stating:

> "Well, it's not the regular kind of work, no, but it can be done if it is necessary". (Tr. 94)*

Petitioner had sought to recover against the respondent shipowner on theories of its negligence and the unseaworthiness of its vessel.

The Trial Court ruled in the Opinion and Order of November 28, 1972, that no negligence of the respondent had been established, that no unseaworthiness of the vessel had been proved and that in any event petitioner was not engaged in work traditionally performed by seamen and therefor was not entitled to a warranty of seaworthiness.

Petitioner's motion for a new trial (which consisted almost exclusively in an attack on petitioner's own witness Earl LeGarde) was denied by the Trial Court.

On appeal to the United States Court of Appeals for the Second Circuit petitioner urged that he was entitled to a warranty of seaworthiness, and that the doctrine of *res ipsa loquitur* applied to the point where respondent was under an obligation to come forward and establish its nonliability. The Court of Appeals rejected petitioner's arguments and affirmed the dismissal of his complaint from the Bench at the close of oral argument.

There is no issue presented in this case as to whether the vessel was or was not "in navigation". Respondent's counsel has admitted throughout the litigation that the vessel was "in navigation". The crux of the case was

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* Number references preceded by the letters Tr. refer to pages of the original trial transcript.

whether the warranty of seaworthiness extended to petitioner because of the contention by respondent that petitioner was not performing duties traditionally performed by members of a ship's crew.

POINT I

Petitioner was not entitled to the warranty of seaworthiness because he was not engaged in work traditionally performed by seamen.

Since the respondent has admitted that s/s Export Commerce was "in navigation" at the time petitioner sustained his injuries in the drydock, no general claim has been made that the respondent did not warrant the seaworthiness of the vessel. In order for petitioner to recover on his unseaworthiness claim, however, he had the burden of establishing not only that an unseaworthy condition existed, but that he was himself entitled to the warranty of seaworthiness.

The ground rules for a determination on this point were set forth by the Supreme Court of the United States in *United Pilots Association* v. *Halecki*, 358 U. S. 613 (1958). In that case the vessel had been brought into the shipyard for annual overhaul. One phase of the overhaul called for dismantling and cleaning the ship's generators with carbon tetrachloride. Halecki, an empolyee of a subcontractor involved in the carbon tetrachloride cleaning, became ill from inhalation of carbon tetrachloride fumes and died two weeks later. An issue arose as to whether Halecki was entitled to the warranty of seaworthiness. The Court wrote as follows at page 617:

> "*Seas Shipping Co.* v. *Sieracki* [328 U.S. 85] and *Pope & Talbot* v. *Hawn* [346 U.S. 406] made clear that the shipowner could not escape liability for unseawothiness by delegating to others work traditionally done by members of the crew. Whether

> their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship."

The Court then continued by stating that Halecki was not doing work traditionally done by seamen, writing as follows:

> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations."

In commenting upon the misleading aspects of labels, such as "electrician", or even, as in our case "machinist", the Court wrote at page 618:

> "It avails nothing to say that the decedent was an 'electrician,' and that many modern ships carry electricians in their crew. *Pope & Talbot* v. *Hawn* explicitly teaches that such labels in this domain are meaningless. See 346 U.S. at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.'"

The same line of reasoning was followed one year later by our Supreme Court in *West* v. *United States, et al.*, 361 U.S. 118 (1959). In commenting upon petitioner's contention that he was entitled to a warranty of seaworthiness even though he was a shore-based worker, the Court wrote at page 122:

> "It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, *rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results.*" (Emphasis supplied.)

More recently, these same standards and tests were endorsed by this Court in *Jackson* v. *Lykes Steamship Co.* 386 U.S. 731 (1967), in footnote 4 on page 734. In that footnote the Court referred to the "wide range of maritime employees [who] have been granted the benefits of the seaworthiness doctrine", but restricted those persons to those "who performed jobs formerly done by seamen".

Petitioner's trial counsel was well aware of the need to meet these test standards, for he called his expert witness Captain Julie Swensson with an eye to establishing that removing or "jumping" a ship's propeller or wheel was work traditionally performed by seamen. The comments of the Trial Court about Captain Swensson's testimony indicate clearly that it too was acutely aware of the decisions of this Court on the question:

> "Captain Swensson testified on the question of whether or not the work of jumping a wheel could be considered traditional seamen's work, even if at the present day it may be done by specialist land-side teams. The Captain's testimony demonstrated the opposite of plaintiff's contention. (A-9) * * *
> No one knew of a case in which a ship's crew had jumped a wheel. Captain Swensson went only

> so far as, in effect, to say that he couldn't see any particular reason why a crew could not undertake the job. He said no more than that any crew of ablebodied handymen could do the job under right supervision. Indeed there appears to be only one instance in which a propellor was reportedly changed by a ship's crew, and the incident was remarkable enough to become a little legend." (A-10)

Furthermore, petitioner's attempt to characterize himself as a machinist engaged on "routine maintenance work" did not carry the day, for the Trial Court rejected this contention writing:

> "The conclusion is inevitable that the jumping of a wheel was not ship's work or crew work either in tradition or in current practice. In this situation, no help is gained by reference to an extended concept of crew work which would define it in terms of the overall nature of the whole job undertaken at Todd and de-emphasize the nature of the subordinate activity within that whole. In a generalized sense drawing a tailshaft is related to ship maintenance and certification, but it is not an operation that could normally be done at sea, and is sufficiently specialized to remove it from the class of activities analogous to crew activities and in that sense entitling the workers involved in it to the warranty of seaworthiness. It is peculiarly a shipyard kind of work, is work on the vessel rather than work of the ship, and work done by outsiders to the vessel and not crew work normal to the ship." (A-10)

Here again, the Trial Court is obviously referring to the principals set forth by this Court in *Halecki, West,* and *Jackson.*

The only conflict between this case and *Rogers* v. *United States,* 452 F.2d 1149 (5 C.A. 1971), is in result rather than in principle. The Court of Appeals for the Fifth Circuit specifically held at 452 F.2d 1151 that "Rogers was performing work traditionally engaged in by seamen". Since

the vessel in the *Rogers* case was also found to be "in navigation", the Court concluded that Rogers was entitled to the warranty of seaworthiness.

Nor is there any validity to petitioner's suggestion that the result to date in this case is in direct conflict with the case of *Allen* v. *Union Barge Line Corp.*, 239 F. Supp. 1004 (E.D. La. 1965) affirmed 361 F.2d 217 (5 C.A. 1966), cert. den. 385 U.S. 1006 (1967). First, we see nothing in the series of *Allen* opinions from which it could be concluded that the work being performed on the towboat involved the removal of her propeller. Second, Allen was engaged in removing a bearing from a propeller shaft, inside the engineroom of the towboat, and the Trial Court found specifically at 239 F. Supp. 1008:

> " • • • that libellant was performing work traditionally performed by seamen (removing a bearing from a propeller shaft); and that he was, at the time of his injuries, entitled to the warranty of seaworthiness. *Lawler* v. *Socony Vacuum Oil Company, supra*".

The case of *Lawlor* v. *Socony Vacuum Oil Co.*, 275 F.2d 599 (2 C.A. 1960), to which reference was made in the quotation above involved an employee of Bethlehem Steel Company who, while working as a foreman at its shipyard, was engaged in marking up places in the tank of a vessel where there were leaks and cracks in the bulkhead. As Lawlor was descending a ladder it fell backwards causing him to sustain serious injuries. Judge Medina wrote at page 602 in the following terms:

> "Recent holdings by the Supreme Court we think leave us no alternative other than to hold, as we do, that Lawlor was engaged in the type of work traditionally done by seaman [Citations]. Chief Officer Bennett testified that at times when the vessel was not in a shipyard for repairs the location and the temporary repair of cracks and leaks in the tank bulkheads were done by him and by members of the

> crew under his supervision. Equipment, including ladders, was on board and it could be and was used for this purpose."

Petitioner criticizes the Trial Court (and inferentially the United States Court of Appeals for the Second Circuit for affirming) for failing to find that petitioner was engaged in work traditionally performed by seamen. We submit respectfully that if any criticism is in order it should be directed to petitioner and his counsel who failed to produce the type of testimony which compelled the courts in the *Lawlor* and *Allen* cases to conclude that these plaintiffs were engaged in work traditionally done by seamen. Petitioner's witness, Captain Julie Swensson was unable to cite even one instance in which a ship's crew had removed a ship's propeller or drawn a ship's tailshaft. Simply stated, petitioner failed to sustain his burden of proof on this point.

POINT II

There was no *in rem* jurisdiction in this case, and petitioner cannot recover under the doctrine of *res ipsa loquitur* because there was no proof that the work on which he was engaged was under the exclusive control of the respondent.

On appeal to the United States Court of Appeals for the Second Circuit petitioner raised for the first time the claim that he was entitled to recover under the doctrine of *res ipsa loquitur*. Perhaps this was triggered by the Trial Court's comment in its opinion:

> "Even if *res ipsa loquitur* be invoked it would not be directed to the ship or its owners but to Todd, which was in charge of the work on its drydock and under its sole supervision". (A-11)

Now, for the first time, Petitioner raises another new point—that where *in rem* jurisdiction has been perfected

there is some additional obligation on the part of a respondent-shipowner to come forward and explain an otherwise unexplained accident.

At the time s/s Export Commerce was in Todd's drydock respondent still had a Master, officers and crew on the payroll assigned to the vessel, but there was no evidence pointing to the presence of any of these persons, either aboard the vessel, or even in Todd's shipyard at the time of the work being performed by petitioner on the propeller and shaft of the vessel.

The only witness to testify to the presence or non-presence of defendant's employees was Earl LaGarde who, when asked whether he had seen any of the officers of the vessel around at the time the work was going on, replied:

> "Not off-hand I can't recall seeing any officers." (B-58)*

Mr. LaGarde's "best recollection" was that he had seen defendant's port engineer, but he added twice:

> "I can't swear to it." (B-58)

This same witness, Todd's assistant night foreman, admitted that he was in charge of the job (Tr.-15), and that the machinist and riggers were working under his supervision (Tr.-26). He also testified that all of the equipment used to remove the ship's propeller was Todd's gear (Tr.-28).

The decision of the Trial Court reflects the non-involvement of the ship's personnel where it was stated:

> "The work was wholly committed to Todd and the interests of the vessel owner and those in responsible charge of the vessel was not in the performance, direction or supervision of the work, but only in checking the adequacy of Todd's completed performance of it." (A-11)

---

* Number references preceded by the letter B refer to pages of petitioner's appendix in the Court of Appeals.

In commenting further upon plaintiff's negligence claim against the defendant shipowner the Trial Court wrote:

> "What might have been the responsibility of ship's crew if they had seen something done which manifestly endangered someone in plaintiff's position is not raised by the case. There was no evidence that any ship's crewmen was on hand at the time, or either was or should have been in a position to have observed the existence of the condition involved, or to have understood whether or not a danger was present." (A-11)

The fact situation is closely akin to what was presented in *West* v. *United States, supra,* where this Court wrote at page 123:

> "Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers."

In *Prosser on Torts,* Fourth Edition, 1971, chapter 4, page 214, the elements for the application of the doctrine of *res ipsa loquitur* are set forth in the following terms:

> "The conditions usually stated in America as necessary for the application of the principle of *res ipsa loquitur* were derived originally from the first edition of Wigmore on Evidence, which appeared in 1905. They are as follows: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."

In *Richardson on Evidence,* Third Edition, 1964, § 93, page 67, the New York Rule is stated to be:

> "Where the instrumentality which caused the accident was in the exclusive control of the defend-

> ant, and the accident which has occurred is one which would not ordinarily happen without negligence, the facts are sufficient to justify an inference of negligence and to cast upon the defendant the burden of coming forward with an explanation."

Since the defendant-shipowner in this case rested at the end of plaintiff's evidence, the following statement in *Richardson,* § 93, page 68, would also seem to be in point:

> "Even if the defendant fails to introduce any evidence, the trial court may not direct a verdict in favor of the plaintiff except, possibly, where the plaintiff's prima facie proof is so convincing that the inference of negligence is inescapable."

In *Manhat* v. *United States,* 220 F.2d 143 (2 C.A. 1955), cert. den. 349 U.S. 966 (1955), Judge Waterman of the United States Court of Appeals for the Second Circuit commented in the following terms at page 145 of 220 F.2d:

> "The rule of res ipsa loquitur deals only with permissible inferences from unexplained events, Johnson v. United States, 1948, 333 U.S. 46, 68 S. Ct. 391, 92 L.Ed. 468; Jesionowski v. Boston & Maine R. R., 1947, 329 U. S. 452, 67 S. Ct. 401, 91 L.Ed. 416 and means simply that, in a given case, the facts of the occurrence warrant the inference of negligence, Sweeney v. Erving, 1913, 228 U. S. 233, 33 S. Ct. 416, 57 L.Ed. 815. Thus, when the facts disclose that the injured party was not at fault, that the instrumentality causing the injury was in the control of the party against whom the doctrine is sought to be invoked and the occurrence is otherwise unexplained, it is permissible to infer that the party in control was negligent."

Since there was no evidence that the job of removing the propeller was under the control of respondent, let alone under its exclusive control, and since the Trial Judge found as a fact that the work "was wholly committed to Todd", there is no room for application of the doctrine of *res ipsa loquitur.*

Even more puzzling is petitioner's reference to *in rem* jurisdiction as it might affect the obligation of the respondent to come forward and explain the accident. On page 15 of the Petition we are referred to the decision of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Oil Transport Company,* 440 F.2d 109 (5 C.A. 1971) and more particularly to footnote no. 6 at the bottom of page 115. That footnote reads as follows:

> "6. Appellant's contention that possession and control of the vessel are immaterial here because in rem liability has been asserted against the vessel, is untenable. As appellee points out (and we have found nothing in the record to the contrary), in rem jurisdiction was not perfected in this case by appellant. There, of course, can be no in rem liability without compliance with the requisites for in rem jurisdiction. See Federal Rules of Civil Procedure. Supplemental Admiralty Rule C."

Equally "untenable" is the argument made by petitioner here, for there was no *in rem* jurisdiction and there could not be any *in rem* liability.

The captions on the originals and service copies of the Summons and Complaint as prepared by petitioner's counsel appear as follows:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 1190

~~LIBEL~~ and COMPLAINT ~~IN REM and PERSONAM~~

Plaintiff Demands A Trial By Jury

JOSEPH DAVIS,

Libelant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S. S. EXPORT COMMERCE, her engines, tackle, cargo, gear and apparel.

Respondents.

The words "*libel* and *in rem* and *personam*" had been lined through leaving us with a civil action with a jury demand.

No warrant for the arrest of the vessel was issued by the Clerk or delivered to a U. S. Marshal for service as required by Rule C (3) of the Supplemental Rules for Certain Admiralty and Maritime Claims. S/S Export Commerce was neither libeled nor attached. No claim of owner was called for or filed.

The action started as a civil action with a trial by jury demanded. Any doubt along these lines is resolved by the Order of Judge John F. Dooling of the United States District Court for the Eeastern of New York, to whom the action has been assigned for all purposes including trial. During the course of an initial pre-trial conference before Judge Dooling on April 5, 1972, counsel

for respondent raised the point that since plaintiff and defendent were both citizens of the State of New York, there was no diversity of citizenship so as to entitle plaintiff to remain on the civil side of the Court and have a trial by jury. Judge Dooling's Conference Memorandum and Order of April 5, 1972, opened as follows:

> "There is no diversity of citizenship and the jurisdiction of this Court in this case depends on its being an admiralty case. It is, accordingly, a non-jury case and the demand for a jury trial contained on the face of the complaint is of no effect."

At most, therefore, this must be considered as an *in personam* action "in admiralty". There were no steps taken to perfect *in rem* jurisdiction, and the vessel, s/s Export Commerce, was never before the Court.

Footnote 6 from *Johnson* v. *Oil Transport Company, supra,* cited by petitioner in his support, could not be more in point to refute petitioner's entire argument.

CONCLUSION

The petition should be denied.

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New York, N. Y. 10004
Counsel for Respondent,
American Export Isbrandsten Lines, Inc.

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1020

JOSEPH DAVIS,

Petitioner,

against

AMERICAN EXPORT ISBRANDSTEN LINES, INC., and S. S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel.

Respondents,

and

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF TODD SHIPYARDS CORP., THIRD PARTY DEFENDANT BELOW, IN OPPOSITION TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Restated	2
Reasons for Denying the Writ	2
Statement	2
POINT I—That the Plaintiff has failed to carry his burden of proof on factual evidence sufficient to establish a prima facie case against the Defendant shipowner is pointed out in the decision of the District Court and affirmed by the Court of Appeals	3
POINT II—There having been no perfection of *in rem* jurisdiction, principles of *in rem* liability are not involved	4
Conclusion	4

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and

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF TODD SHIPYARDS CORP., THIRD PARTY DEFENDANT BELOW, IN OPPOSITION TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

Todd Shipyards Corp., Third Party Defendant below, submits this memorandum in opposition to Plaintiff's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on the 24th day of October, 1973, which judgment affirmed the judgment of the United States District Court for the Eastern District of New York.

Opinions Below

Petitioner's Appendix to his petition sets forth the text of the opinion of the United States District Court for the Eastern District of New York, together with the text of the affirmance without opinion by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The jurisdictional requisites are set forth in the Petition on page 2.

Questions Restated

1.) Where a plaintiff has failed to carry his burden of proof on factual issues to establish a prima facie case of negligence or unseaworthiness against a defendant shipowner, should this Court grant certiorari?

2.) Where there has been no attempt to acquire and no perfection of, *in rem* jurisdiction, is any *in rem* theory of liability before a Court?

Reasons for Denying the Writ

Based upon the evidence introduced at the trial, the decision below in no way conflicts with holdings of other circuits or imposes a limitation over the protection provided by the Sieracki doctrine. There being no *in rem* jurisdiction reference in the Petition to *in rem* remedies, are out of place.

Statement

The opinion of the U. S. District Court contains several specific references to failures by plaintiff to introduce evidence sufficiently probative of negligence or unseaworthiness on the part of the shipowner to require the shipowner to produce counter evidence.

POINT I

That the Plaintiff has failed to carry his burden of proof on factual evidence sufficient to establish a prima facie case against the Defendant shipowner is pointed out in the decision of the District Court and affirmed by the Court of Appeals.

The opinion of the District Court which is set forth in the Petitioner's Appendix, after explaining the circumstances, of Plaintiff's injury and the evidence reflected in the record, points up that the Plaintiff had failed to introduce any testimony to illuminate the physics of the problem (A-7). It further points out that the Plaintiff had not shown that the practice adopted by the shipyard was in any way negligent or inadequate or that it created a condition of transitory unseaworthiness (A-9). That there was no evidence supporting Petitioner's proposition that it was "seaman's work" to remove the 47,000 pound propeller is also noted in the decision of the District Court (A-10). Finally, the District Court clearly stated: "Something may have been done at the time of the accident which is lost to recollection. It is certainly not in evidence" (A-12).

In the circumstances expressed by the District Court and fully approved by the Second Circuit theories of legal liability of shipowners whether historic or recently determined by judicial decision are in no way affected by the decision of the District Court herein.

POINT II

There having been no perfection of *in rem* jurisdiction, principles of *in rem* liability are not involved.

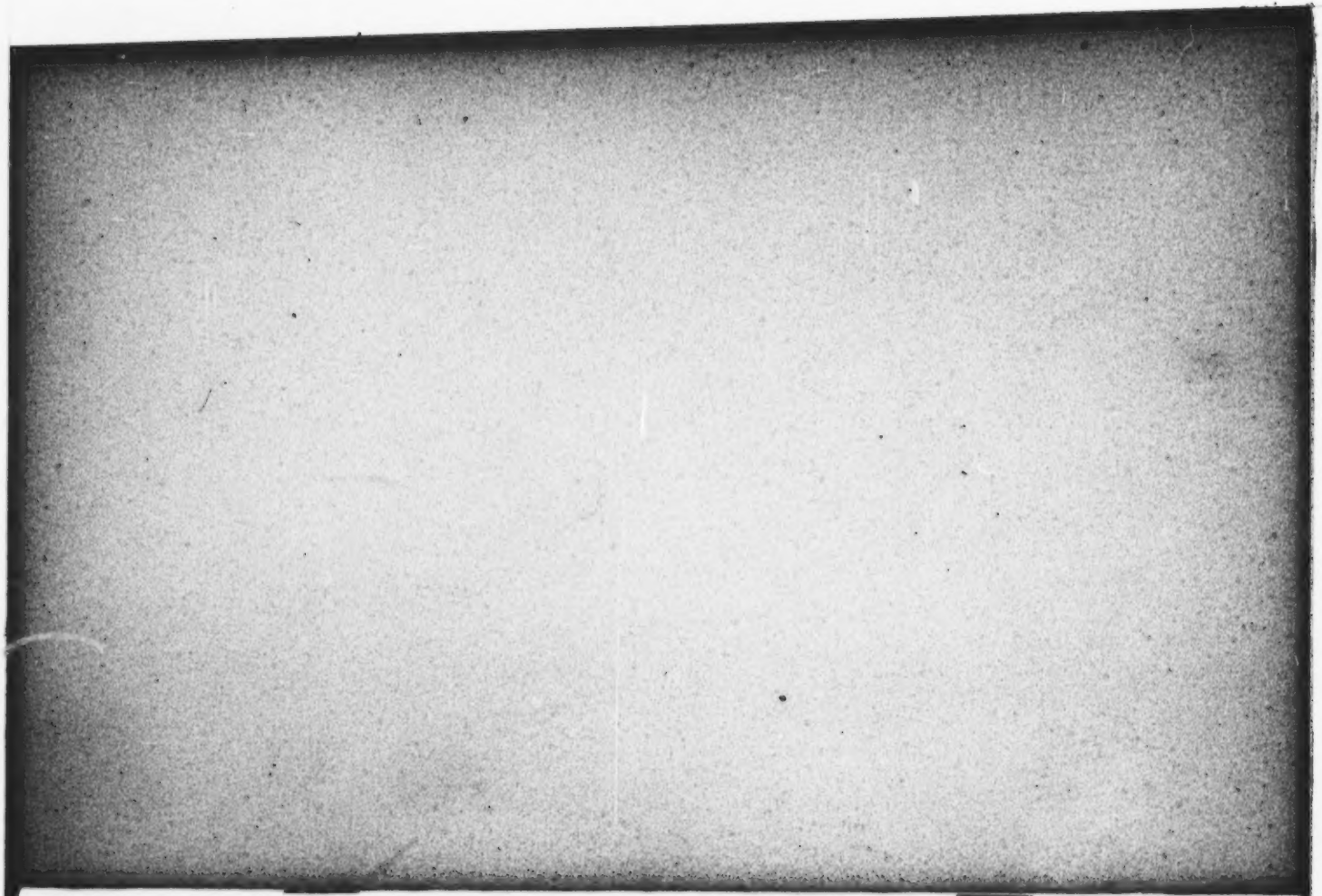
The docket entries and the record below contradict Petitioner's statements set forth in its petition to the effect that *in rem* jurisdiction had been perfected against the vessel. There is no indication of process having been issued against the vessel, no posting of substitute security, no arrest of the vessel reflected in the docket or other records of this case. This fact is confirmed in the Respondent-Defendant, American Export Isbrandtsen Lines, Inc. brief in opposition to the Petition on pages 2, 3 and pages 16 and 17.

Conclusion

WHEREFORE, it is respectfully prayed that the Petition for certiorari sought by the plaintiff petitioner be denied.

Respectfully submitted,

DANIEL L. STONEBRIDGE
Counsel for Third Party Defendant
Todd Shipyards Corp.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1020

Supreme Court, U.S.
FILED
FEB 4 19
MICHAEL RODAK, JR.

JOSEPH DAVIS, 73-1020 Petitioner

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel,

Respondents,

-and-

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSING BRIEF

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TABLE OF CONTENTS

Page

Statement 2

POINT I — A Clear Conflict Exists Between The Case At Bar And The Holding Of The District Court And The Circuit Court of Appeals For The Fifth Circuit In The Case Of Allen v. Union Barge Line Corporation, Supra, Contrary To Respondent's Misstatements. 3

POINT II — There Was In Rem Jurisdiction Herein As Reflected Both By The Record On Appeal And By Affidavit Of Service By U.S. Marshal Attached Hereto And Marked Exhibit I 4

Conclusion 5

Case Cited:

Allen v. Union Barge Line Corp., 239 F. Supp. 1004 (E.D. La. 1965 affirmed 361 F.2d 217 (5 C.A. 1966) cert. den. 385 U.S. 1006 (1967) 2

Slater v. Erie Lackawanna R.R. Co. 411 F2d. 1015 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 1020

JOSEPH DAVIS,

Petitioner

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
and S.S. EXPORT COMMERCE,
her engine, tackle, cargo, gear and apparel,

Respondents

-and-

TODD SHIPYARDS CORP.

Third Party Defendant

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSING BRIEF

STATEMENT

Petitioner is required to reply to respondent's opposing brief by reason of two vital errors affecting petitioner's rights and present application.

First, under POINT NO. I respondent opposes the petition herein upon the fundamental argument that there is no validity to petitioner's suggestion that the result to-date in this case is in conflict with the case of Allen v. Union Barge Line Corp., 239 F. Supp. 1004 (E.D. La. 1965 affirmed 361 F. 2d 217 (5 C.A. 1966) cert. den. 385 U.S. 1006 (1967); and, therefor, that petitioner is not entitled to the protection of the warranty of seaworthiness which the District Court and the 5th Circuit Court of Appeals granted to "Allen" because the facts are not similar.

On page ten (10) of its brief, the first full paragraph thereof, the respondent erroneously states as follows:

> "*****First, we see nothing in the series of Allen opinions from which it could be concluded that the work being performed on the towboat involved the removal of her propeller*****".

Secondly, under Point No. II respondent erroneously states that in rem jurisdiction was not perfected in this case; and, therefor, petitioner cannot recover under the doctrine of res ipsa loquitur, because exclusive control of the vessel by respondent was not established by the petitioner.

POINT I

A CLEAR CONFLICT EXISTS BETWEEN THE CASE AT BAR AND THE HOLDING OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE OF ALLEN V. UNION BARGE LINE CORPORATION, SUPRA, CONTRARY TO RESPONDENT'S MISSTATEMENTS.

In its FINDINGS OF FACT — Nos. (1), (4) and (5) the District Court found 239 F. Supp. 1006, as follows:

> "1.***and, removing propeller shafts and installing new sleeves thereon.
>
> 4. Libelant boarded the M/V Mariner on March 23, 1963, as an employee of Dravo. He was to assist in the removal of the propeller shafts by removing the couplings therefrom.
>
> 5. The M/V Mariner is a 192 foot long diesel powered push boat, she has twin screws with two shafts separated by a centerline bulkhead***".

Quite obviously the respondent and no doubt the Court below overlooked or disregarded the aforesaid facts which not merely establish a distinct similarity between the work involved in "Allen", supra, and in this case, but quite obviously, if anything, the "Allen" job required the removal of two propellers and not one, as petitioner Davis was involved with, since the M/V Mariner was a twin screw vessel and Allen was to assist in the removal of both propellers as part of his work, for which the district court and the circuit court of appeals of the 5th circuit provided him with the "Sieracki" protection as a matter of law.

POINT II

THERE WAS IN REM JURISDICTION HEREIN AS REFLECTED BOTH BY THE RECORD ON APPEAL AND BY AFFIDAVIT OF SERVICE BY U.S. MARSHAL ATTACHED HERETO AND MARKED EXHIBIT I

The statements in respondent's brief under Point II concerning in rem jurisdiction are clearly erroneous and do not coincide with the facts, and are in conflict with the record on appeal and the original affidavit of service by U.S. Marshal, on file in the United States Courthouse, upon respondents; which shows in rem jurisdiction perfected September 8, 1971.

Petitioner never waived its right to proceed against the respondents and both the summons (A-8)* and the complaint (A-11)* demonstrate in rem and in personam jurisdiction having been obtained by the filing of a libel; which, furthermore, constituted the basis for the trial of the case in admiralty to the Court.

Indubitably, res ipsa loquitur must apply — contrary to the holdings below, particularly because no proof or evidence was presented at the trial by respondent that it had no control of the vessel deemed to be in navigation; and, especially in view of the fact that respondent was actually engaged in performing and supervising repairs generally aboard the vessel in various and sundry parts thereof as shown by references in petitioner's application.

*Appellant's Appendix on Appeal.

Petitioner's inability to recall any of the circumstances of the accident also raises a presumption of due care on his part; and, no proof or evidence was adduced on the trial by the respondents that the accident and attendant injuries arose as a result of petitioner's activities in prosecuting and performing his work detail aboard ship.[1]

The Court below was in clear error respecting the application of the doctrine of res ipsa loquitur, because of the grossly erroneous conclusion that the vessel was under the exclusive control of TODD SHIPYARDS CORPORATION.

CONCLUSION

The petition should be granted.

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Counsel for petitioner
JOSEPH DAVIS

GEORGE G. KILARJIAN
On the Brief

1. See Slater v. Erie-Lackawanna Railroad Company, 411 F. 2d 1015 (1969).

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REMARKS:

USM-285 (Rev. 12-15-70) — 5. NOTICE OF SERVICE